SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 507

MARYLAND CASUALTY COMPANY,

Petitioner,

against

FIRST NATIONAL BANK IN YONKERS,

Respondent,

and

THE CITY OF NEW YORK WILLIAM CASEY & SONS, INC., UNITED STATES OF AMERICA, CHARLES H. HANSON, CHARLES W. GRANT, JAMES MARTIN, ROBERT M. JOHNSON, as Trustees of the New York City Carpenters' Welfare & Pension Fund, and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Of Counsel

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The City of New York, William Casey & Sons, Inc., United States of America, Charles H. Hanson, Charles W. Grant, James Martin, Robert M. Johnson, As Trustees of the New York City Carpenters' Welfare & Pension Fund, and Liberty Mutual Insurance Company,

Defendants.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Facts

Casey's all moneys assignment to Yonkers Bank on February 7, 1956 of "all money or moneys due or to become due" Casey under its contract with the City (10a-13a) was in full conformity with Section 25 of the Lien Law of the State of New York (64a) and contained the

trust fund provision required by the Lien Law, Article 2, Section 25, Subdivision 5 thereof (11a). It was duly approved by the City on the day of its execution (64a), and was duly and timely filed as prescribed by the Lien Law of the State of New York (64a).

Prior to the said assignment the City made two progress or partial payments under the contract to Casey (74a). After said assignment became effective, the City made three more partial payments under the contract to Yonkers Bank as Casey's all moneys assignee (74a-75a).

The validity of the assignment, as such, has never been challenged on any ground.

Casey owed Yonkers Bank, on and after May 10, 1956, $50,000 for advances made upon the assignment, which Casey never repaid (64a). That indebtedness has never been challenged.

After the City, by its letter of June 13, 1956, declared Casey in default (143a-145a) the following moneys and categories of moneys were held by the City applicable to the Casey contract (131a-132a, 133a):

1. $47,133.90—Estimate No. 6—moneys earned by Casey under the contract for work up to May 15, 1956 and certified by the City, prior to default, to be due and payable under the contract to Yonkers Bank as Casey's assignee.

2. $9,715.24—Estimate No. 7—moneys earned by Casey prior to default but not certified by the City prior to default to be due and payable.

3. $60,434.60—retained percentages—the total of the moneys retained out of each partial payment, but not due or payable until satisfactory completion of the contract.

(The City also held, of course, the remaining balance in contract.)

This case, and the judgment directed to be entered by the Court of Appeals in favor of respondent, involves only the first category of moneys above—the $47,133.90 (Sixth Estimate) certified by the City prior to default to be due under the contract and to be due and payable to Yonkers Bank as Casey's all moneys assignee.

The City, though at all times admitting that the sixth partial payment was certified and due and payable (129a), failed to make the payment to Yonkers Bank prior to default, as it should have.

This case does *not* involve any of the other moneys set forth above, namely, retained percentages of $60,434.60, or money earned by the Contractor before default of $9,715.24 but never certified by the City prior to default, or the balance in contract.

The Court of Appeals, in reversing summary judgment granted below in favor of the Casualty Company, and in remanding with directions to enter judgment in favor of Yonkers Bank, held that, under a proper construction of the terms of the City-Casey contract and the documentary evidence, the City had no right to withhold the payment of the Sixth Estimate in the sum of $47,133.90 which was due and payable before the effective date of Casey's default, and should have paid the same to Yonkers Bank, as Casey's all moneys assignee (290 F. 2d 246, at 249).

The Question Presented

Did the Court of Appeals correctly hold that Yonkers Bank, under its all moneys assignment, was entitled to the Sixth progress payment of $47,133.90, certified by the City prior to default to be due and payable to Yonkers Bank, to the exclusion of any right therein on the part of the Casualty Company?

The Reasons Why the Application for the Writ Should Be Denied

1. The Casualty Company's blanket indemnity agreement and the assignment therein contained was not the ground upon which it staked its case below, and, in any event, was absolutely void as to Yonkers Bank (78a-80a and Appendix 1 hereto).

2. It is fundamental that, as subrogee of the City, the Casualty Company's rights can rise no higher than those of the City—no higher than the rights reserved by the City in its contract with Casey. Article 48 (38a-39a) governed whatever rights the City had to retain and withhold money following the declaration of default by it pursuant to Article 45 (36a-38a) of the City-Casey contract and gave the City the power to retain "only such monies as would have been payable to the Contractor if it had completed the work" (39a). The Court of Appeals correctly held that the power of retention governed by Article 48 did not cover the Sixth progress payment so that the City had no power to retain money under that Article which it had certified, prior to default, to be due and payable to Yonkers Bank.

3. The holding of the Court of Appeals, under the terms of the City-Casey contract, is strictly in accord with principles of suretyship law established by applicable decisions of the courts of the State of New York and of the Lien Law of the State of New York.

The Casualty Company rested its case below squarely upon the principle of subrogation (40a), claiming that it is subrogated to all the rights of the City as against Casey and anyone claiming under Casey and upon the equitable doctrine of relation back (to the date of its bonds) after default (40a).

The holding of the Court of Appeals is strictly in accord with New York case law as to the importance of contract terms in determining the scope of the owner's right to withhold (and hence the surety's subrogated right thereto) upon the contractor's default, and as to the distinctions in the kinds of moneys involved in applying the subrogation doctrine.

> *Schuessler* v. *Metropolitan Casualty Insurance Company of New York*, 265 N. Y. 648 (1934);
> *American Radiator Co.* v. *City of New York*, 223 N. Y. 193 (1918);
> Cf., *Slattery* v. *National Commercial Bank & Trust Co.*, 247 App. Div. 221 (1936);
> *State Bank of Albany* v. *Dan-Bar Contracting Co., Inc.*, 12 A. D. 2d 416 (March, 1961).

In *State Bank of Albany, supra,* the Appellate Division, in sustaining the priority of the Contractor's all moneys assignee over the claims of Maryland Casualty Co., as subrogated surety, said at page 418:

> "Cases which have determined the surety's rights to be superior have turned upon the express contractual right of the obligee to resort to the withheld funds for one purpose or another; * * *"

While the petition quotes from the opinion of the lower court in *State Bank of Albany, supra,* and particularly that court's characterization of the category of moneys involved in the instant case, it is obvious that the citation of the instant case (in the lower court's reference thereto in the *State Bank of Albany* case) is to the decision of the District Court and not to the Court of Appeals. It is equally obvious that the lower court in the *State Bank of Albany* case misconstrued the nature of the moneys involved in the instant case because it referred to the same as "the unpaid balance due the contractor"—which

was the only category of moneys involved in the *State Bank of Albany* case. Here, the only category involved is the Sixth Estimate certified by the City, prior to default, as payable to Yonkers Bank as assignee of Casey.

Insofar as this case involves only moneys certified before default to be due and payable—the Sixth Estimate—it is governed by *People* v. *Continental Casualty Company*, 157 Misc. 15 (1935)—decided one year after *Scarsdale National Bank and Trust Company* v. *United States Fidelity and Guaranty Company*, 264 N. Y. 159 (1934). It was held in *People* v. *Continental Casualty Company, supra*, that as to moneys certified to be due prior to default, mechanic's liens filed prior to default attached thereto and, in view of the contract terms there employed by the City, the subrogated surety had no right to such certified moneys, the City having reserved its right only with respect to the retained percentages.

The rights of assignees and mechanic's lienors are equally governed by the same Section of the Lien Law of the State of New York—Section 25—the pertinent provisions of which are set forth in Appendix 2 hereto.

4. As pointed out by the Court of Appeals in its opinion herein, the New York cases relied upon by the Casualty Company are all distinguishable. The Court said, 290 F. 2d 246 (1961), at page 251:

> "• • • In each, case the contract involved explicitly gave the party in the position of the City the right to retain all money in its possession including money that was due and payable to the party in Casey's position. • • •"

Stanton v. *Babor-Comeau & Co., Inc.*, 168 Misc. 190 (1938), affd. 260 App. Div. 831 (1940), leave to appeal denied 260 App. Div. 980 (1940), relied upon by petitioner here (but cited for the first time in its petition

for rehearing to the Court of Appeals), did not involve anything more than retained percentages and the uncertified balance in contract following the contractor's default. It did not involve the separate category of moneys (here involved) certified to be due and payable prior to default. There was there involved a State of New York contract which, having been cancelled by the State, expressly gave it the power thereupon to apply "any funds retained" (the retained percentages) toward the completion of the contract.

5. The Court of Appeals correctly ruled that Casey could be defaulted only by the City's following the procedures set forth in Article 45 (the default clause) with the result that the City's declaration of default, communicated by letter of June 13, 1956, did not become effective until June 14, 1956. Correct, also, was the further ruling of the Court of Appeals that the Sixth certified Estimate was due and payable to Yonkers Bank under the contract before the default became effective.

Articles 13, 16 and 23 of the City-Casey contract, referred to in the petition herein, were no part of the record on the motion for summary judgment in the District Court and were raised for the first time by the Casualty Company in its petition for rehearing to the Court of Appeals. They clearly do not relate to the specific issue of the Sixth certified Estimate here involved, and the Court of Appeals obviously agreed by its denial of the petition for rehearing.

6. The Court of Appeals correctly held that the failure of the City to require Casey to file the statement required by Section 220-a of the New York Labor Law constituted a waiver of the City's right to withhold payment until such a statement was furnished.

As the Court of Appeals pointed out, the City had ample time (on the motion for summary judgment in the District Court) to cite the absence of a Labor Law statement as a

ground for withholding the Sixth certified Estimate if it had thought it a proper ground to assert. Three times prior to the certification of the Sixth Estimate the City paid certified estimates to respondent, as Casey's assignee, without the Labor Law statement (74a-75a). Obviously, the City did not consider the statement necessary before paying Yonkers Bank, as all moneys assignee (as distinguished from Casey, the contractor) in view of respondent's assignment which contained the trust fund covenant of the contractor required by Section 25, Subdivision 5 of the Lien Law, nor did it conceive it as its duty to require the same, as it did in connection with the first two estimates (prior to the assignment)paid directly to Casey (75a). Moreover, the Labor Law statement (150a-151a), does not require certification by the contractor that no moneys are owed to laborers—merely a statement of the amount due laborers, if any. Even beyond that, while petitioner cites Section 220-a of the Labor Law, it does not refer to Section 220-b (82a-84a), which clearly indicates that moneys are to be deducted by the financial officer of the municipal corporation, from any payment, only where a protest in writing has been filed by a laborer, or "if for any other reason it may be deemed advisable". The record is barren of any protest in writing by an unpaid laborer and since the Sixth Estimate was certified by the City for payment to Yonkers Bank, the City did not deem it advisable to deduct any portion of that payment.

In any event, it was a decision for the City to make, and having made it, Maryland cannot attack it collaterally, because it claims subrogation only to the rights of the City.

The only case cited by petitioner on this point having any resemblance to the rights of Yonkers Bank is *Vulcan Rail & Construction Co., Inc.* v. *County of Westchester*, 250 App. Div. 212 (1937), where the assignee bank lost its

priority over lienors because its assignment did not (as distinguished from the case at bar) contain the trust fund covenants required by Section 25, Subdivision 5 of the Lien Law, the Court having held that the inclusion of the trust fund covenant in the all moneys assignment is a necessary condition of such priority.

7. It ill behooves petitioner to contend that the Court of Appeals erred in granting summary judgment to Yonkers Bank "despite the presence of genuine and material issues of fact". It did not so contend when it itself cross-moved for summary judgment in the District Court. Here the Court of Appeals, after analyzing "the contractual provisions and the documentary evidence" unanimously held

> "On the record we find no material issues of fact."

8. The decision of the Court of Appeals in the instant case was not, as claimed by petitioner, in conflict with that Court's decisions in the two cases cited by petitioner (p. 16).

In the first place, as petitioner concedes, they both involved the priority of the Government tax liens.

Fidelity & Deposit Company of Maryland v. *New York City Housing Authority*, 241 F. 2d 142 (2nd Cir. 1957), aside from the distinctly different contract terms there employed governing payments, involved only "an unpaid balance on the contract" and not, as here, a payment certified to be due and payable, and which should have been paid, prior to default.

Massachusetts Bonding and Insurance Company and United States of America v. *State of New York, In re Fago Construction Corporation*, 259 F. 2d 33 (2nd Cir. 1958), involved a Federal contract, not governed by the New York Lien Law. It did not involve a payment certified to be due and payable, and which should have been

paid, prior to default. In fact, there was no declaration of default in *Massachusetts Bonding* and, insofar as the surety was concerned, it decided only the right to a portion of a progress payment made possible by the surety's advances to the contractor, which had been diverted by the contractor and had subsequently come into the hands of his trustee in bankruptcy. In the instant case the Sixth certified Estimate (for work completed up to May 15, 1956) (133a) was made possible by the advances of Yonkers Bank under its assignment and not by petitioner, which only "About the middle of May, 1956" was informed by Casey that it was in trouble financially and then set up a "program" for the advance of moneys to Casey (138a)—obviously, in the future.

9. The Court of Appeals did not, as claimed by petitioner, decide the issues in this case, in conflict with the decisions of this Court, and the cases cited by petitioner on that issue are inapposite here.

None of them dealt with the status of an all moneys assignee under the New York Lien Law, nor did they involve, as here, a payment certified to be due and payable, and which, because of the contract terms here involved, should have been paid to Yonkers Bank under its all moneys assignment, prior to default, and none of them involve the application of New York law with respect to the importance of contract terms in determining the scope of the owner's right to withhold (and hence the surety's subrogated right thereto) upon the contractor's default, and the importance of the distinctions in the kinds of money involved in applying the subrogation doctrine—as pointed out, *supra*.

Moreover, petitioner's statement under this same point to the effect that as assignee under its blanket indemnity agreement executed on October 21, 1954, it take priority over the assignment to Yonkers Bank, which was executed

February 7, 1956, because petitioner's "assignment was first in time and therefore first in right" is an erroneous statement of the law of New York. Its assignment is wholly invalid and ineffectual as against Yonkers Bank's statutory assignment, valid in all respects under the Lien Law of the State of New York (79a-80a and Appendices 1 and 2 hereof).

10. The present application does not come within any of the considerations governing review on certiorari set forth in Rule 19 of the Rules of this Court, nor are the principles involved in this case "of great importance in so far as the rights of a completing surety as opposed to those of an assignee are concerned", as claimed by petitioner.

The decision of the Court of Appeals does not in any way affect the validity of the subrogation doctrine in and to retained percentages, moneys earned prior to default and not certified to be due and payable and to the balance in contract. It would not "in a great many instances deprive sureties of the protection which they have enjoyed under the law prior to said decision" but is in affirmation of existing New York law as to the limited issue here involved. It is not of vital importance to sureties generally, and is in fact of little, if any, importance to them, because the facts and circumstances of this case and the contract clauses here involved, rarely combine to require the result here reached, which involved no new principles of suretyship or New York contract law. In essence, the Court of Appeals construed a New York contract entirely in keeping with New York law and held that the City failed to pay Yonkers Bank when it should have.

CONCLUSION

The application for the writ should be denied.

Respectfully submitted,

SAMUEL GOTTESMAN,
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First National Bank in Yonkers.

Of Counsel,

SAMUEL GOTTESMAN,
GERALD M. SMITH.

Dated: November 10, 1961.

APPENDIX 1

Section 16 of the Lien Law of the State of New York provides as follows:

> "*Assignment of contracts and orders for public improvement to be filed*
>
> No assignment of a contract for the performance of labor or the furnishing of materials for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor or sub-contractor upon the public corporation, or the head of the department or bureau having charge of the construction or demolition of such public improvement, or the financial officer of the public corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid unless such assignment or order, or a copy thereof, be filed within twenty days after the date of such assignment of contract, or such assignment of money, or such order, with the head of the department or bureau having charge of such construction or demolition, and with the financial officer of the public corporation or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be inforceable from the time of such filing, and no such assignment or order shall have any validity until the same shall have been so filed, and every such assignment or order, not recorded, shall be absolutely void as against a subsequent assignee in good faith and for valuable consideration, whose assignment or order is first duly recorded. The financial officer of the public corporation, or other officer or person with whom the assignment order, or copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose. As amended L. 1944, c. 363, § 10; L. 1947, c. 878, § 3, eff. Sept. 1, 1947."

APPENDIX 2

Section 25 of the Lien Law of the State of New York provided, to the extent here pertinent, as follows:

> *"Priority of liens and assignments under contracts for public improvements. Parity of liens of same class*
>
> In an action to enforce a lien under a contract for a public improvement, or an assignment of moneys, or any part thereof, due or to become due under such contract, parties having liens or assignments shall have priority as follows:
>
> (1) Except as provided in section five an assignee of moneys, or any part thereof, due or to become due under a contract for public improvement, whose assignment is duly filed prior to the filing of a notice of lien or assignment of every other party to the action, shall have priority over those parties to the extent of advances made upon such assignment before the filing of the notice of lien or assignment next subsequent to his assignment, but as to advances made subsequent to a notice of lien or assignment filed and unsatisfied or not discharged such assignee for the purpose of determining his proportionate share of moneys available for distribution as provided in subdivision four of this section shall be treated as a lienor having a lien to the extent of advances so made.
>
> (2) An assignee of moneys or any part thereof, due or to become due under a contract for a public improvement whose assignment is duly filed subsequent to the filing of the notice of lien or assignment of any other party shall for the purpose of determining his proportionate share of moneys available for distribution, as provided in subdivision four of this section be treated as a lienor having a lien to the extent of advances actually made upon such assignment prior to the filing thereof.

(3) Laborers for daily or weekly wages having liens under a contract for a public improvement, shall have preference as a class for the full amount of their unpaid wages over all other lienors having liens arising under the same contract and without reference to the time when such laborers shall have filed their notices of liens.

(4) There shall be no priority among labor lienors, as a class or among other lienors as a class, and any moneys available for distribution among lienors of any class shall be distributed pro rata in accordance with their respective valid liens.

(5) Every assignment of moneys, or any part thereof, due or to become due under a contract for a public improvement shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee and will hold the right to receive such moneys as a trust fund to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement, and that he will apply the same to such payments only, before using any part of the moneys for any other purpose. Nothing in this subdivision shall be considered as imposing upon the assignee any obligation to see to the proper application of the moneys advanced under such assignment by the assignee. To the extent that the trust res consists of the right to receive moneys as distinct from moneys actually received, breach of the trust shall give rise to a civil action only. As amended L. 1942, c. 216 § 11 eff. March 29, 1942; L. 1942, c. 808, §§ 8, 10, eff. Sept. 1, 1942."

• • •